

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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FILED

MAY 3 1994

AT 8:30 _____ M
WILLIAM T. WALSH
CLERK

02-89-0377 *partial*

CIVIL ACTION NO. 90-3792 (AJL)

UNITED STATES OF AMERICA,
Plaintiff,

v.

ADVANCED ENVIRONMENTAL
TECHNOLOGIES CORPORATION,
ET AL.,

Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

A.T. & T. TECHNOLOGIES, INC.,
ET AL.,

ENTERED
on
THE DOCKET
5-4 19 94
by WILLIAM T. WALSH, CLERK
(Deputy Clerk)

CIVIL ACTION NO. 90-3789 (AJL)

CONSENT DECREE

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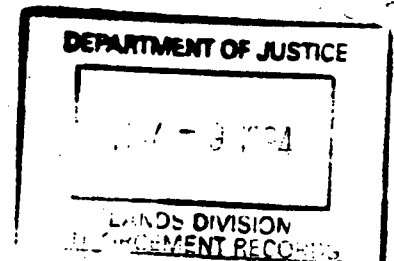


TABLE OF CONTENTS

I.	<u>BACKGROUND</u>3
II.	<u>JURISDICTION</u>5
III.	<u>PARTIES BOUND.</u>5
IV.	<u>DEFINITIONS.</u>5
V.	<u>REIMBURSEMENT OF RESPONSE COSTS.</u> . . . . .	.8
VI.	<u>FAILURE TO MAKE TIMELY PAYMENTS.</u> . . . . .	.8
VII.	<u>COVENANTS NOT TO SUE BY PLAINTIFF.</u> . . . . .	.9
VIII.	<u>COVENANTS BY SETTLING DEFENDANT.</u> . . . . .	.11
IX.	<u>EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION.</u> . . . . .	.12
X.	<u>EFFECT OF BANKRUPTCY ON SETTLEMENT</u> . . . . .	.14
XI.	<u>RETENTION OF RECORDS</u> . . . . .	.14
XII.	<u>NOTICES AND SUBMISSIONS.</u> . . . . .	.16
XIII.	<u>RETENTION OF JURISDICTION.</u> . . . . .	.17
XIV.	<u>LODGING AND OPPORTUNITY FOR PUBLIC COMMENT</u> . . . . .	.17
XV.	<u>SIGNATORIES/SERVICE.</u> . . . . .	.17

I. BACKGROUND

WHEREAS, the United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA");

WHEREAS, the United States in its complaint seeks reimbursement of response costs incurred and to be incurred by EPA and the Department of Justice for response actions in connection with the release or threatened release of hazardous substances at the Chemical Control Superfund Site in the City of Elizabeth, Union County, New Jersey ("the Site"), and a declaration of Settling Defendant's liability for further response costs;

WHEREAS, the Defendant that has entered into this Consent Decree ("Settling Defendant") does not admit to any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint;

WHEREAS, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 21, 1984, 49 Fed. Reg. 37,070;

WHEREAS, EPA has performed and funded response actions in connection with the Site, including a Remedial Investigation and Feasibility Study ("RI/FS");

WHEREAS, the United States has entered into a consent decree with the defendants to this suit, with the exception of the Settling Defendant, for performance of the Remedial Design and Remedial Action selected by EPA for the Site in its Record of Decision dated September 23, 1987 (said consent decree having been entered by this court on October 29, 1991), and for reimbursement of certain costs incurred by the United States in connection therewith;

WHEREAS, the objective of the current Consent Decree with Settling Defendant is to settle the United States' claim against Settling Defendant under Section 107 of CERCLA, 42 U.S.C. § 9607, for the reimbursement of Past Response Costs, as defined herein, incurred for the Site by or on behalf of the United States prior to the date of lodging of this Consent Decree with the Clerk of this Court;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607 and 9613(b). This Court also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District and shall not challenge the entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to any transfer of assets or real or personal property, or bankruptcy, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

b. "Consent Decree" shall mean this Decree and any attached appendices.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal Holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

e. "Interest," in accordance with 42 U.S.C. § 9607(a), shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507. In calculating the Interest EPA may compound on a daily, monthly or annual basis.

f. "National Contingency Plan" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including but not limited to any amendments thereto.

g. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral, a lower-case letter, or the word "WHEREAS".

h. "Parties" shall mean the United States and Settling Defendant.

i. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that EPA and the U.S. Department of Justice on behalf of EPA have incurred for response actions at the Site prior to the date of lodging of this decree, and accrued interest on such costs.

j. "Plaintiff" shall mean the United States.

k. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on September 23, 1987 by the Regional Administrator, EPA Region II, and all attachments thereto.

l. "Remedial Action" shall mean the response actions at the Site set forth in the Record of Decision.

m. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

n. "Settling Defendant" shall mean Raymark Industries, Inc. by, on behalf of, or as successor to Raybestos-Manhattan, Inc.

o. "Site" shall mean the Chemical Control Superfund Site, encompassing approximately 2.2 acres, located in the City of Elizabeth, Union County, New Jersey at 23 South Front Street on Block 4, Lots 1438, 1438C, and 1438D, and a portion of the adjacent Elizabeth River into which waste materials from Block 4, Lots 1438, 1438C, and 1438D may have come to be located.

p. "State" shall mean the State of New Jersey.

q. "United States" shall mean the United States of America and its agencies and departments.

V. REIMBURSEMENT OF RESPONSE COSTS

4. Payment of Past Response Costs to the United States.

Within one hundred and eighty (180) days of entry of this Consent Decree, Settling Defendant shall pay to the United States \$22,000.00 for Past Response Costs plus Interest calculated from the date of entry of the Consent Decree through the date of payment. Payment shall be made by Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice lockbox bank, U.S.A.O. file number 9003358, the EPA Region and Site/Spill ID number 02/55, and D.O.J. case number 90-11-2-293A. Payment shall be made in accordance with instructions provided by the Plaintiff to the Defendant upon execution of the Consent Decree. Payments by EFT must be received by the U.S. Department of Justice lockbox bank by 4:00 P.M. (Eastern Time) to be credited on that day. Notice of the payment shall be made to the United States as specified in Section XI (Notices and Submissions).

VI. FAILURE TO MAKE TIMELY PAYMENTS

5. Interest on Late Payments. In the event that the payment required by Paragraph 4 is not made when due, Interest, as provided for in Paragraphs 3 and 4, shall continue to accrue on the unpaid balance, through the date of payment.

6. Stipulated Penalty. If any amount due to the United States under this Consent Decree is not paid by the required

date, and the United States has not exercised any right it may have under Paragraph 16, Settling Defendant shall pay as a stipulated penalty, in addition to the Interest required by Paragraph 5, \$1,500.00 per day that such payment is late. Stipulated penalties are due and payable within 30 days of Settling Defendant's receipt from EPA of a demand for payment of the penalties. Payment shall be made by Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice lockbox bank, U.S.A.O. file number 9003358, the EPA Region and Site/Spill ID number 02/55, and D.O.J. case number 90-11-2-293A. Payment shall be made in accordance with instructions provided by the Plaintiff to the Defendant upon execution of the Consent Decree. Payments by EFT must be received by the U.S. Department of Justice lockbox bank by 4:00 P.M. (Eastern Time) to be credited on that day. Notice of the payment shall be made to the United States as specified in Section XI (Notices and Submissions). Penalties shall accrue as provided above regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment.

7. If the United States must bring an action to collect any payment required by this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

8. Payments made under Paragraphs 6-8 shall be in addition to any other remedies or sanctions available to Plaintiff by

virtue of Settling Defendant's failure to make timely payments required by this Consent Decree.

VII. COVENANTS NOT TO SUE BY PLAINTIFF

9. Except as specifically provided in Paragraph 11, the United States covenants not to sue or to take administrative action against Settling Defendant or its officers, directors, employees, or agents, in their capacity as representatives of Settling Defendant, pursuant to Section 107(a) of CERCLA relating to Past Response Costs. These covenants not to sue shall take effect upon the receipt by EPA of all payments required by Section V (Reimbursement of Response Costs) and Section VI (Failure to Make Timely Payments). These covenants not to sue are conditioned upon the complete and satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to Settling Defendant and do not extend to any other person.

10. Reservations of Rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified therein. Except as provided in the preceding paragraph, nothing contained herein shall in any way limit or restrict the authority of the United States to initiate appropriate action, either judicial or administrative, under Sections 104, 106, or 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, and 9607. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with

respect to all other matters, including but not limited to, the following:

- (i) claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- (ii) liability arising from the past, present, or future disposal, release, or threat of release of waste materials outside of the Site;
- (iii) liability for damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss;
- (iv) liability for response costs that have been or may be incurred by any federal agencies other than EPA or the Department of Justice on behalf of EPA;
- (v) criminal liability;
- (vi) liability, if any, for violations of federal or state law which occur during or after implementation of the Remedial Action; and
- (vii) claims for costs incurred or to be incurred by the United States in connection with the Site that are not Past Response Costs as defined herein.

VIII. COVENANTS BY SETTLING DEFENDANT

11. Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Site or Past Response Costs or this Consent Decree, including, but not limited to, any direct or

indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507), under CERCLA §§ 106(b)(2), 107, 111, 112, or 113, or any other provision of law, or any claims relating to Past Response Costs. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

IX. EFFECT OF SETTLEMENT: CONTRIBUTION PROTECTION

12. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

13. With regard to claims for contribution against Settling Defendant for Past Response Costs, the Parties hereto agree that Settling Defendant is entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2). This paragraph shall take effect upon the receipt by EPA of all payments required by Section V (Reimbursement of Response Costs) and Section VI (Failure to Make Timely Payments). Furthermore, this paragraph

is conditioned upon the complete and satisfactory performance by Settling Defendant of its obligations under this Consent Decree.

14. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify in writing the United States within 10 days of service of the complaint on it. In addition, Settling Defendant shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial for matters related to this Consent Decree and always before the date the matter is set for trial.

15. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the

covenants not to sue set forth in Section VII (Covenants Not to Sue by Plaintiffs).

X. EFFECT OF BANKRUPTCY ON SETTLEMENT

16. Settling Defendant is currently the object of an involuntary bankruptcy petition filed against it in the United States Bankruptcy Court for the Eastern District of Pennsylvania, captioned In re: Raymark Industries, Inc., Bankr. No. 89-20233 (Bankr. E.D. Penn. filed Feb. 10, 1989). Settling Defendant represents that no Order for Relief has been entered against it in that action or any other action. In the event that an Order for Relief is entered against Settling Defendant in the action referenced above or in any other action before the full payments specified in Section V (Reimbursement of Response Costs) and Section VI (Failure to Make Timely Payments) have been made, whether timely or not, this Consent Decree shall be voidable by the United States and if voided the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

XI. RETENTION OF RECORDS

17. Until 6 years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to its liability for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

18. At the conclusion of this document retention period, Settling Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States Settling Defendant shall deliver any such records or documents to the EPA. Settling Defendant may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted. However, no documents reports, or other information created or generated pursuant to the requirements of this or any other consent decree with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all documents, records, and information that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Defendant's favor.

19. Settling Defendant hereby certifies, individually, that it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA and Section 3007 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6907.

XII. NOTICES AND SUBMISSIONS

20. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and Settling Defendant, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: 90-11-2-293A

As to EPA:

Kristine M. Leopold
Assistant Regional Counsel

U.S. E.P.A. Region II
26 Federal Plaza
New York, NY 10278

As to Settling Defendant:

Brendan K. Collins
Ballard, Spahr, Andrews & Ingersoll
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

XIII. RETENTION OF JURISDICTION

21. This Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

XIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

22. This Consent Decree shall be lodged with the Court for a period of thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

23. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

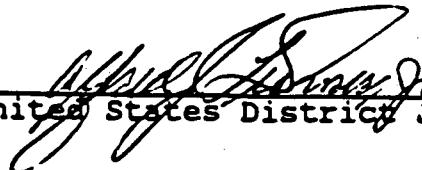
XV. SIGNATORIES/SERVICE

24. The undersigned representative of Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the United States

Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

25. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. Settling Defendant waives any objection to service made by mail to the person so identified.

SO ORDERED THIS 3 DAY OF May, 1984.


United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Advanced Environmental Technologies Incorporated; United States v. A.T. & T. Technologies, Inc., Civil Nos. 90-3792 (AJL), 90-3789 (AJL) (D.N.J. Filed Sept. 21, 1990) (Consolidated cases) relating to the Chemical Control Superfund Site in the City of Elizabeth, Union County, New Jersey.

FOR RAYMARK INDUSTRIES, INC. BY, ON BEHALF OF, OR AS SUCCESSOR TO DEFENDANT RAYBESTOS-MANHATTAN, INC.:



Date: 7 JUNE 1993

Name: DEREK R. EVANS

Title: PRESIDENT

Address: RAYMARK INDUSTRIES INC
75 EAST MAIN ST.
STRATFORD, CT 06497

Agent Authorized to Accept Service on Behalf of Above-signed Party: BALLARD SPAHR ANDREWS & INGERSOLL


Name: Brendan K. Collins

Title:

Address: 1735 Market Street, 51ST Floor
Philadelphia, PA 19103-7599

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FOR THE UNITED STATES OF AMERICA:



Lois J. Schiffer
Acting Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530


Date: 1/7/94

Michael Chertoff
United States Attorney
District of New Jersey



By: Susan Cassell
Assistant U.S. Attorney
Deputy Chief, Civil Division

Date: 2/1/94




Timothy K. Webster
Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Date: 1/25/99

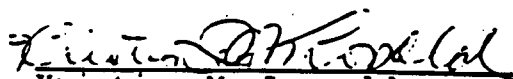
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FOR THE UNITED STATES OF AMERICA:



William J. Muszynski, P.E.
Acting Regional Administrator
Region II
U.S. Environmental Protection
Agency

Date: 9/27/93



Kristine M. Leopold
Assistant Regional Counsel
Region II
U.S. Environmental Protection
Agency

Date: 9/16/93